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No. 91-398

Supreme Court, U.S.

FILED

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In The

# Supreme Court of the United States

October Term, 1991

FIRST SOUTHERN INSURANCE COMPANY,

*Petitioner,*

vs.

BRENDA MASSEY,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court  
of Appeals for the Eleventh Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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## **QUESTIONS PRESENTED FOR REVIEW**

A. Whether an uninsured motorist carrier, which has contractually agreed and is statutorily bound to pay for any damages to its insured caused by an uninsured motorist, provided that the carrier is given notice of the pendency of the suit against the tortfeasor by its insured, is constitutionally entitled to be served with a summons directed to it.

B. Whether the United States Constitution requires service of a summons upon an uninsured motorist carrier as a condition precedent to the insurance carrier's contractual and statutory liability to pay insurance benefits to its insured.

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**RESPONDENT'S BRIEF IN OPPOSITION**

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**STATEMENT OF THE CASE**

**A. Course of Proceedings and Disposition in Court Below**

On March 12, 1989, Margarete Almy (hereinafter "Almy") negligently caused her automobile to collide with the automobile driven by respondent Brenda Massey (hereinafter "Massey"),

injuring Massey. Massey subsequently filed suit in the State Court of Muscogee County, Georgia, seeking money damages for her injuries. Based upon Massey's belief that Almy was or might be uninsured, Massey caused service to be made upon Atlanta Casualty Company and First Southern Insurance Company (hereinafter "First Southern"), both of whom provided uninsured motorist coverage available to Massey.

Service was made pursuant to the provisions of Official Code of Georgia Annotated § 33-7-11 upon First Southern Insurance Company. That Code section [Appendix F to the Petition for Writ of Certiorari, page 16(a)] gives the uninsured motorist carrier so served the option to answer the lawsuit in its own name, in the name of the uninsured motorist/tortfeasor, or do nothing.

The State Court action was served upon the agent for service appointed by First Southern, who promptly forwarded the pleadings to First Southern. In addition, counsel for Massey provided to First Southern by certified mail, with return receipt, a copy of the lawsuit being filed against the uninsured motorist, and personally discussed the lawsuit with First Southern's claim agent on the telephone. Notwithstanding actual personal service upon its designated agent for service, and actual receipt of the certified letter from respondent's counsel, and the personal telephone call from respondent's counsel, First Southern filed no pleadings.

Approximately thirty-three days after service upon First Southern, First Southern's agent for service learned that no defensive pleadings had been filed by First Southern, and informed the company of its right under Georgia law to pay costs and file pleadings. A copy of this letter to first Southern is attached hereto at Appendix A, *infra* at 1a.

On January 29, 1990, a trial was held in open court in

Muscogee County, Georgia, regarding the automobile accident. Evidence was presented as to the facts of the accident, and as to the respondent's injuries and damages. Following the trial, judgment was awarded to Massey against Almy (not against First Southern) in the amount of \$320,000.

Massey then tendered the judgment to First Southern for payment pursuant to its contractual obligations under the policy of insurance which it sold, and First Southern has refused to pay the judgment.

On April 26, 1990, First Southern itself filed the instant action in the United States District Court for the Middle District of Georgia, Columbus Division, seeking a declaratory judgment of that court that no payment was due Massey under the uninsured motorist coverage afforded by First Southern. Massey filed defensive pleadings and a counterclaim, seeking judgment against First Southern for its uninsured motorist coverage.

The United States District Court granted Massey's motion for summary judgment pursuant to her counterclaim, and First Southern appealed to the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals affirmed the District Court's order, per curiam. First Southern then filed a motion for rehearing and a suggestion of rehearing en banc, which was denied. First Southern then filed a motion in the United States Court of Appeals for the Eleventh Circuit to stay the mandate, which motion was denied by the Eleventh Circuit. First Southern has now filed in this Court the petition for writ of certiorari, and a motion to stay the enforcement of the judgment. The motion to stay enforcement has already been denied by this Court.

#### **B. Statement of Facts**

Most of the facts of this case involve the proceedings in the

courts below, and thus many relevant facts have been set forth above in part A. In addition, the following facts are relevant to this action.

First, Southern Insurance Company sold an insurance policy, policy number 01552374, to Jay & Gene Pontiac in Columbus, Georgia, thereby subjecting First Southern to the rules and requirements of Georgia law regarding the sale of insurance policies in this State. One of those requirements is set forth in O.C.G.A. § 33-7-11, entitled "Requirements of motor vehicle liability policies; coverage of claims against uninsured motorists." (See Appendix F, page 16(a), Petition for Certiorari.)

Respondent herein, Brenda Massey, was an insured under that insurance policy, entitled to the benefits of the uninsured motorist coverage contained in that policy. On March 12, 1989, Respondent Brenda Massey was negligently injured by an uninsured motorist in an automobile accident. She subsequently filed suit against the tortfeasor, and served the uninsured motorist carrier, petitioner First Southern, with a copy of the pleadings she had filed against the tortfeasor, together with a notice specifically informing First Southern of the pendency of the action and of its opportunity to participate. In addition, a copy of the lawsuit against the tortfeasor was sent by certified mail to First Southern, and by telephone First Southern acknowledged receipt of that lawsuit.

First Southern now claims that, despite personal service of the underlying lawsuit upon its specifically named agent for service, and despite personal service upon the same agent of a notice of the pendency of the suit and of First Southern's right to participate, and despite personal receipt by First Southern by certified mail of the same lawsuit, and despite personal confirmation of receipt of the lawsuit by telephone, the notice to First Southern was insufficient to meet constitutional due process requirements.

## SUMMARY OF ARGUMENT

The respondent respectfully submits that this is not a case which meets this Court's criteria for the granting of a petition for certiorari, and, more importantly, the case was correctly decided by the courts below in the first instance.

Contrary to the assertions of the petitioner, there was no default judgment taken against petitioner First Southern. There was a default judgment taken against Margarete Almy, the tortfeasor, following due and legal service of summons upon her. No party has ever questioned the validity of the service against the tortfeasor.

Georgia law requires insurance companies to pay judgments against uninsured motorists if the insured carries uninsured motorist coverage, and if notice of the pendency of the suit is given to the insurance company. (*See* O.C.G.A. § 33-7-11, Appendix F of Petition for Certiorari.) In the case at bar, it is undisputed that First Southern had actual notice of the pendency of the lawsuit and of its status as uninsured motorist carrier. Moreover, all of the courts below have held that the service upon the uninsured motorist carrier both met the statutory requirements for service, and that the statutory requirements do not violate due process of law. It is clear beyond question that the Constitution of the United States does not require service of a summons upon a party to a contract in order to invoke that party's contractual liability under that contract.

The petitioner's claim of "fatal confusion" is totally unsupported by the record and is in fact a claim made by the petitioner's lawyers, and not by the petitioner itself. There was and is no confusion on the part of First Southern. First Southern is liable to pay its contractual obligations under the insurance policy, and the District Court and the Eleventh Circuit Court of Appeals properly so held.

This is not an appropriate case for the granting of the petition for certiorari, and we respectfully pray that this Court deny the writ.

## **REASONS FOR DENYING THE WRIT**

### **I.**

The facts and circumstances of this case meet none of the criteria or considerations for the granting of a writ of certiorari in this Court, as set forth in Rule 10 of this Honorable Court. While respondent recognizes that these considerations set forth in Rule 10 to be considered by the Court are neither controlling nor exhaustive, respondent respectfully submits that they are clearly indicative of the fact that this Court should not grant the petition for the writ of certiorari in this case.

As stated in Rule 10 of the Supreme Court Rules, “a review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only where there are special and important reasons therefor . . . .” The petitioner has certainly shown no “special and important reasons” for the granting of the writ in this case. There has been no showing, nor can there be, that the decision of the Eleventh Circuit Court of Appeals is in conflict with the decision of any other United States Court of Appeals on the same matter; or that the Eleventh Circuit decision is in conflict with a decision of any state court of last resort; or that the decision has departed from the accepted and usual course of judicial proceedings. (See Rule 10.1(a), Supreme Court Rules.) Neither does this case involve a decision of a state court of last resort resolving a federal question in conflict with established federal decisions [see Supreme Court Rule 10.1(b)], nor an important question of federal law which has not been, but should be, settled by this Court, or that the Eleventh Circuit has decided a federal question in a way that conflicts with the decisions of this Court.

For the foregoing reasons, the respondent respectfully prays that this Court deny the petition; the case involves no questions of law which merit this Court's granting a petition for certiorari.

## II.

The petitioner has misstated the question presented for review in this Court.

In its petition, First Southern has stated the issue as follows:

Whether a summons properly served on a party not named in an action, which by its expressed terms warns only the named party that an appearance must be made to avoid a default judgment, without any other notice to the non named recipient, and a subsequent default money judgment against the recipient, meets the requirements of procedural due process under the United States Constitution, (i.e., whether notice to A that B will suffer default judgment if B does not file an answer is constitutionally sufficient to support a subsequent default judgment against A without any further notice to A).

This "issue" posed by the petitioner bears no relation whatsoever to the facts of this case.

The fact is that petitioner First Southern does not seek to overturn a default judgment against it (i.e., against First Southern). On the contrary, the judgment which First Southern now asks this Court to review was obtained against First Southern as a counterclaim in a case brought by First Southern itself. As shown on page 2 of the petition of First Southern, First Southern itself filed the declaratory judgment petition in the United States District

Court, and respondent Brenda Massey fired a counterclaim, seeking to enforce the contractual and statutory liability of First Southern to pay a judgment which had earlier been rendered against the uninsured motorist tortfeasor, Margarete Almy. The ~~petitioner's~~ statement of the question, to the effect that a default judgment was taken against petitioner, is totally misleading and inaccurate.

The fact of the matter is that First Southern is not being called upon to pay a default judgment against it, but to pay a contractual obligation which it undertook in the form of an insurance policy which it issued. First Southern has been adjudged liable on that contractual obligation in a counterclaim filed by Brenda Massey, the respondent, in a lawsuit filed by First Southern itself. There can be no question that First Southern had notice of the pendency of that action, since First Southern filed it.

The petitioner's reliance upon *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), and upon *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978), are both misplaced and without merit. Having stated the question for decision to be something other than it actually is, the petitioner has attempted to bootstrap an argument based upon *Mullane*, *supra*, and *Memphis Light, Gas & Water Division*, *supra*. Those cases simply do not apply to the case at bar. Here, the petitioner First Southern contractually agreed to pay insurance policy benefits in the event certain conditions precedent were met. First Southern has filed a suit challenging whether those conditions precedent to contractual liability were all met, and, having had a full and ample opportunity to argue its case to both the District Court and the Eleventh Circuit Court of Appeals, both of those courts have held that all contractual conditions precedent have been met. There is simply no due process question to be decided.

## III.

There is no genuine constitutional issue for decision by this Court. The petitioner has misstated the issue, and has attempted to parlay the case into one of constitutional proportions. Those constitutional issues simply do not exist under the facts of this case.

Moreover, the petitioner failed to preserve the constitutional claims which it now proposes as the basis for this Court's jurisdiction, by failing to present argument or citation of authority in the court below in support of those claims.

While petitioner now attempts to invoke this Court's jurisdiction based upon the notion that this case involves constitutional issues, petitioner wholly failed to present any argument or citation of authority in the court below in support of those issues.

The only reference in the petitioner's trial court brief with regard to its claim of unconstitutionality is found at page 11 of that brief, and states:

Moreover, summons expressly directing Almy to file an answer within thirty days does *not* satisfy the requirements of notice to *First Southern* under procedural due process, pursuant to either the State or Federal Constitutions. U.S. Constitution Amendment 5, 4; Georgia Constitution Article I, § 1, paragraph 1. (Emphasis in original.)

Thus, petitioner failed to address what it now claims to be the constitutional issue in anything but the most cursory and conclusory fashion in the trial court. Not a single case was cited by petitioner in the trial court in support of its claim. Even in the brief of the appellant filed by First Southern in the United

States Court of Appeals for the Eleventh Circuit, not a single case was cited, and no substantive argument made, in support of its constitutional claims. Only in its reply brief and its petition for rehearing did First Southern even cite *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950) and even then its argument to the Eleventh Circuit only remotely resembled the argument which it now makes in this Court.

The petitioner having presented no argument to the trial court in support of its constitutional issue, the trial court quite appropriately dismissed that claim summarily, and petitioner has failed to preserve that issue for appeal.

#### IV.

From the inception of this case, First Southern has insisted that it was entitled to have a summons "directed to it", instructing First Southern that, if it failed to file defensive pleadings in the state court action against the tortfeasor, a default judgment would be taken against it. Such a notice would have been contrary to Georgia law, and would itself have been an abuse of process.

As the Court can see from a reading of O.C.G.A. § 33-7-11(d) [Appendix F of the Petition for the Writ of Certiorari, page 16 (a)], the insurance company is not required to file an answer within thirty days of service upon it. Rather, the insurance carrier has an *option* to file defensive pleadings in its own name, in the name of the uninsured motorist, or both, or neither. To have instructed First Southern that it was required to file defensive pleadings within thirty days, as suggested by First Southern attorneys, would have been untrue and inappropriate.

Moreover, Georgia law *precludes* the issuance of a summons directed to the uninsured motorist carrier. In *State Farm Mutual*

*Automobile Insurance Co. v. Brown*, 114 Ga. App. 650, 152 S.E. 2d 641 (1966), the Georgia Court of Appeals dealt with this precise question, and held that the plaintiff is *precluded* from naming the uninsured motorist carrier as a defendant, and is consequently *precluded* from issuing process against it.

State Farm contends that this statute does not authorize the insurance company to be named and served as a "nominal defendant" in a damage suit against a known uninsured motorist. We agree. The statute provides that "a copy of service shall be made upon the insurance company . . . *as though* such insurance company were a party defendant". (Emphasis supplied). The use of the words "as though" *precludes* the naming of the insurance company as a party defendant *and the consequent issuance of process against it . . .*" (Emphasis added.)

*Brown, supra*, 114 Ga. App. 650, 152 S.E. 2d 641 (1966).

Thus, the claim of First Southern that it was entitled to have process "directed to First Southern" is completely contrary to the plain reading of the statute and to the interpretation of that statute by the Georgia Court of Appeals.

## V.

Petitioner's claim that the notice it received of the underlying tort action "fatally misled First Southern about the pendency of the action", is manufactured and ingenuine.

Petitioner had every opportunity to present any evidence it chose to the trial court regarding the effect of the notice it received as to the pendency of the tort action in the State Court of Muscogee

County, Georgia. In none of the affidavits filed in support of its position did any officer, agent or employee of First Southern claim to be misled, confused, or otherwise uncertain of what was to be done. The claim now made by First Southern's lawyers that it was "fatally misled" has been created by those lawyers, and is completely without any factual support in the record. If First Southern wished to claim confusion, it was incumbent upon the petitioner to present evidence which would support such a finding. No evidence was presented in that regard.

Moreover, a party to an insurance contract, in this case the insurance company itself, cannot avoid liability for its contractual obligations under that contract by claiming that it somehow became misled or confused. It is incumbent upon the insurance company to understand its options when served with an uninsured motorist lawsuit. Those options are clearly set forth in O.C.G.A. § 33-7-11(b), at page 21(a) of Appendix F of the petition for certiorari as follows:

In the case of a known owner or operator of such vehicle, either or both of whom are named as a defendant in such action, the insurance company issuing the policy shall have the right to file pleadings and take other action allowed by law in the name of either the known owner or operator or both or itself.

Thus, as a matter of statutory law and contractual right, First Southern could have answered the underlying suit against the tortfeasor in the name of the tortfeasor or in its own name. It was incumbent upon First Southern, having elected to do business in the State of Georgia, to understand its obligations and rights with regard to the uninsured motorist coverage, and its current claim that it was "misled" is totally without merit.

**CONCLUSION**

This case meets none of this Court's criteria for the granting of the writ of certiorari. It is a contract case, and the issue in the case is whether or not the notice required by the Georgia statute is sufficient to invoke the petitioner's contractual liability under its insurance policy. There can be no doubt that the notice was constitutionally adequate.

For the foregoing reasons, the respondent respectfully prays that this Court deny the petition for the writ of certiorari.

October 9, 1991

Respectfully submitted,

JERRY A. BUCHANAN  
HATCHER, STUBBS, LAND,  
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**APPENDIX A — LETTER DATED OCTOBER 10, 1989 FROM  
CHARLES L. DREW, ESQ. TO FIRST SOUTHERN  
INSURANCE COMPANY**

**DREW, ECKL & FARNHAM**  
Attorneys at Law  
880 West Peachtree Street  
P.O. Box 7600  
Atlanta, Georgia 30357  
(404) 885-1400

October 10, 1989

Claims Manager  
First Southern Insurance Company  
First Southern Plaza  
201 E. Kennedy Blvd.  
P.O. Box 3370  
Tampa, Florida 33601

RE: Brenda Massey vs. Margarete Almy  
State Court of Muscogee County  
Civil Action No. SC89CVI3984

Dear Sir:

Plaintiff's attorney advised Wray Eckl of our firm on October 10, 1989 that you had gone into default.

Georgia law gives you an additional fifteen days to answer if you pay the costs.

Very truly yours

s/ Charles L. Drew  
Charles L. Drew

*Appendix A*

CLD/pdc

[Stamped] Another exciting assignment!

10-10-89

Sent this ltr. to First So.

10-10-89 per Mr. Eckl. Also

attached prior corresp. of 9-7-89

with copy of petition.

I called & verified address.

s/ Peggy (Boynton)

